Nduhiu v Ngomo & Munguti t/a Miritini Sunshine Academy & 3 others (Environment & Land Case E010 of 2024) [2024] KEELC 13668 (KLR) (2 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13668 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E010 OF 2024

LL NAIKUNI, J

DECEMBER 2, 2024

BETWEEN

LYDIA NJAMIU NDUHIU ..... PLAINTIFF

AND

KATANU NGOMO & PETER KITALI MUNGUTI T/A MIRITINI SUNSHINE ACADEMY ..... 1ST DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND DEFENDANT

NATIONAL CONSTRUCTION AUTHORITY ..... 3RD DEFENDANT

COUNTY GOVERNMENT OF MOMBASA ..... 4TH DEFENDANT

RULING

I. Introduction

1. This Honorable Court is tasked to make a determination of issues raised from the filed Notice of Motion application dated 31st July, 2024 by Katanu Ngomo & Peter Kitali Munguti t/a Miritini Sunshine Academy, the 1st Defendant herein. The application was premised under the provision of Sections 1A, 2A, 3 and 3A of the *Civil Procedure Act*, Cap., Order 5 Rule 1, Order 40 Rule 7 and Order 51 Rule of the Civil Procedure Rules 2010, and other enabling provisions of the law. At the same time, the 1st Defendant also filed a Preliminary Objection dated 7th August, 2024 seeking to have the Plaintiff's suit struck out and/or dismissed.

2. Upon the application and the objection being served, the Honourable Court as a matter of precedence decided to deal with the Preliminary objection. Thus, the Honourable Court will render its ruling on its merit and further direction accordingly.

II. The Preliminary Objection by the 1st Defendant/Applicant's case

3. The 1st Defendant raised a 6 Paragraphed Preliminary objection on a point of law to have the Plaintiff's suit struck out and/or dismissed on the following grounds that:-

    a. The suit was filed by the Plaintiff was an abuse of the court process, having been filed prematurely, contrary to the provisions of Sections 61, 78, and 80 of the PLUPA, No. 3 of 2019, Laws of Kenya.

    b. Sections 61, 78, and 80 of the PLUPA provide clear and mandatory procedures and administrative remedies for addressing complaints regarding approvals by physical planning departments, which the Plaintiff had not exhausted.

    c. The Plaintiff was required by law to exhaust all available administrative remedies, including but not limited to seeking redress through the relevant County Government authorities and the CountyPhysical and Land Use Planning Liaison Committee, before invoking the jurisdiction of this Honourable Court.

    d. The Plaintiff's failure to exhaust these statutory remedies and procedures renders this suit incompetent and improperly before the Court, warranting its dismissal in limine.

    e. In view of the forgoing, the Honourable Court lacked jurisdiction to hear and determine this matter and in the circumstances, urged to down its tools.

    f. The Plaintiff's suit dated 10th June, 2024 and the attendant application were, therefore, an abuse of the court process and should be struck out and/or dismissed with costs to the 1st Defendant.

III. Submissions

4. While all the parties were present in Court, they were directed to the Preliminary Objection dated 7th August, 2024 be disposed of by way of written submissions. By the time of penning down this Submissions, the Honourable Court was only able to access the submissions by the Plaintiffs and the 3rd Defendant. Pursuant to that the Honourable reserved 21st November, 2024 for the delivery of the ruling accordingly.

A. The Written Submissions by the Plaintiffs.

5. The Plaintiffs through the Law firm of Messrs. Kanyi J & Company Advocates while submitting in respect to the 1st Defendant's preliminary point of law dated 7th August, 2024 filed their written submissions. M/s. Mango commenced by submission on the following issues of Law. The Learned Counsel recounted that the said objection stated that:-

> "……..the Plaintiffs suit is an abuse of the court process having been filed prematurely, contrary to the Provision of Sections 61,78 & 80 of the Physical & Land use Planning Act, Cap. 303, Laws of Kenya in that the Plaintiff was required by law to exhaust all available administrative remedies before invoking the jurisdiction of the court and therefore the court lacked jurisdiction to hear and determine the matter.

6. In its submissions the 1st Defendant stated that it commenced construction in November, 2023. Their bone of contention was that the construction of the school within a residential area was a project that was out of character with the surrounding area and further that an Environmental Impact assessment

and public participation were necessary pre-requisites before approvals to proceed with construction are granted. The 1st Defendant contended that he acted within the confines of the law presenting all documents to the relevant county departments so as to start construction and that the plaintiff should have exhausted all available administrative remedies before filing suit.

7. The Learned Counsel asserted that the Plaintiffs' responses was that in case of" "Mukisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors (1969) EA 696, Law JA, stated that:-

> "So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."
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> Sir. Charles Newbold in the same case: "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

8. Further, in the case of:- "Samuel Waweru – Versus - Geoffrey Muhoro Mwangi [2014] eKLR: the Court held:-

> " This court must now consider whether the issues raised in this Preliminary Objection are matters of fact or law. I have perused the reasons by the applicant in his Preliminary Objection. I have not seen a single point of law that has been raised. What has been raised are purely matters of fact which the defendant's counsel ought to have a chance to respond to. I hold the view that by filing such an objection, the Plaintiff has denied the defendant the opportunity to respond factually to the Preliminary Objection2. As a matter of Law, a party upon whom a Preliminary Objection is served, does not have a right to respond factually and can only place before the court the law applicable. What the plaintiff should have done was to raise matters in relation to conflict by filing a formal application.:

9. Additionally, in the case of "Aviation & Allied Workers Union Kenya – Versus - Kenya Airways Limited & 3 others [2015/ eKLR the Supreme Court observed:-

> " Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record. While, therefore, the preliminary objection was in no way frivolous, it is our considered opinion that the same did not meet the threshold set in the Mukisa Biscuit case. There was a dispute between parties as to the nature of the application before the Court, and the applicant persuaded the Court sufficiently that it only sought extension of time. Hence, the preliminary objection fails."

10. In the case of "National Bank of Kenya Limited – Versus - Peter Kipkoech Korat and another (2005) eKLR, Gacheche J. detailed as follows:-

> " Mr. Kuloba, Learned Counsel for the bank was however of the view that the Preliminary Objection is not sustainable, as the issues of conflict of interest cannot be raised by way

of a Preliminary Objection. I am inclined to agree with him as the legal position regarding Preliminary Objection was well laid down in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696,in which Law JA, stated that '...a Preliminary objection consists of a point of law argued as a preliminary point may dispose of the suit....' It is clear to me that the issue raised by the defendants pertaining to representation of these parties, would require evidence and in which case they cannot be entertained by way of Preliminary Objection as relations cannot be inferred and on that ground alone, this objection cannot be sustained."

11. Thus, the Learned Counsel opined that a preliminary objection therefore must:

> Be a pure point of law which has been pleaded, or which arises by clear implication out of pleadings and cannot be raised if any fact is to be ascertained through evidence.

12. She posed - What is a pleading? The provision of Section 2 of the *Civil Procedure Act*, Cap. 21 defines a pleading to include a petition, summons, statement of claim or demand, or defence, reply to defence or Counter - Claim. (See "Stephen Boro Githua – Versus - Family Finance Building Society & 3 others [2015] eKLR)

13. In this case the Plaint would be the pleading in this matter. Affidavits filed by the 1st Defendant are not pleadings. The Defendant had to date not filed any Defence to the Plaintiffs claim. This being the case then the preliminary objection must fail as:-

    A. The point of law had not been pleaded. In the case of "Stephen Onyango Achola & Anotherr – Versus - Edward Hongo Sule & Another(2004) eKLR, the Court of appeal stated:-

> " the provisions of Order V1Rule 4 (1) and (2) required him to specifically plead the statute on which provision he relied to defeat the appellants claim. Support for order V1 RULE 4(1) and (2) is to be found in Halsbury's Laws of England, 4th Edition,Vol.36 at paragraph 48 page 38 headed:-"Matters which must be specifically pleaded; The defendant must in his defence plead any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud, or any act showing illegality. Other matters which must be so pleaded are the statute of fraud, and the provision of the law of property act and it seems, any ground of objection to the jurisdiction of the court.
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> Court stated further, The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it.
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> Further, in the case of "Argos Furnishers Limited vs Comat Trading Company Limited (2021) eKLR, where the Honourable Judge having quoted "the Stephen Achola" (Supra) held as follows:-
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> > " At the end of the day, a party cannot benefit from a defence that it has not pleaded. Consequently, I find and hold the Defendant's preliminary objection lacks merit as it is not founded on its Statement of Defence".

    B. The objection does not arise by clear implication out of the Plaintiffs pleadings;.

i. The Defendant in their submissions relied on the averments under the Paragraphs *11* & 14 of the Plaint in which the Plaintiff averred that the Defendant had failed to exhibit signage board showing approvals if any had been given and that the construction of the school within a residential area was a project out of character with its surrounding (change of user which she was unaware of for lack of the signage board) and needed an EIA and public participation as prerequisites before approvals to proceed with construction were granted.

ii. That having failed to file a defence this facts were therefore uncontroverted and were deemed agreed as they are prima facie presented in the pleadings on record.

iii. As the facts that there was no signage showing approvals if any had been granted, that there was need for an EIA, need for public participation and project being out of character with its surrounding are admitted then Sections 61, 78 and 80 of the *Physical and Land Use Planning Act* regarding the procedures and administrative remedies for addressing complaints does not arise.

14. This is so as the functions of the Liaison committee was to hear appeals against decisions made by the planning authority with respect to physical and land use development plans. Having admitted the absence of approvals then the Liaison Committee would have no locus to hear and determine any appeal.

15. The Learned Counsel submitted that should the Court find that the preliminary objection was merited, she drew the Court's attention to the provision of Section 93 of the *Physical and Land Use Planning Act*. She averred that the Liaison Committee where the Plaintiff would have lodged her claim had she been made aware of the approvals was yet to be established in the County of Mombasa. Therefore, this Honourable Court has jurisdiction to determine the matter. No evidence was adduced to show that the County Physical & Land Use Planning Liaison Committee had been established for the Plaintiff to have appealed to it. To buttress on this point, she cited a case of "Karomo & Seinfert & others – Versus - Pamwhite limited and The County of Mombasa (2022) eKLR, this very Court stated:

> "I take cue from the famous decision to invoke the original and inherent jurisdiction of this court relating to environmental planning and protection by the decision1 in Mombasa Judicial review 14 of 2019 by judge Sila Munyao establishing the purposes of invoking the inherent jurisdiction of the environment and Land Court under Section 93 of the Act when he noted
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> .....where the parent statute has provided a mechanism for resolving disputes, the court ought to be slow to invoke its inherent jurisdiction and unless there are special circumstances, for example, that the body meant to hear the dispute has not been constituted, then the court ought ordinarily to defer jurisdiction to the specific dispute mechanism body that has been provided for in the statute.
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> Thus based on this glaring legal lacuna and vacuum, created by the county government of Mombasa, the only place left the Plaintiff herein, is to institute this case before this honourable court. Until and unless this legal structure is actually created, and it becomes vibrantly operational, the court of law should never smash them with machete.....Thus, on that front the preliminary objection fails.

16. For the reasons which they had enumerated above, the Learned Counsel contended that the point of law was not pleaded, that it did not rise from a clear implication of the pleadings (Plaint) and that there

was no Liaison Committee that has been established within the plaintiff's jurisdiction. In conclusion, she humbly submitted that this preliminary objection be dismissed with costs and the Plaintiffs allowed to urge their case.

B. The Written Submission by the 3rd Defendant

17. The 3rd Defendant/Respondent through the Counsel – M/s. Cindy Ogola of the 3rd Defendant filed their written submissions dated 11th November, 2024. M/s. Ogola Advocate commenced her submission by providing Court with the brief recount and background of the Preliminary Objection raised by the 1st Defendant and the Plaintiff's case herein. The Counsel stated that the Plaintiff alleged that the 1st Defendant had commenced construction of a school on Plot No.446 Miritini -Miritni Site and Service Scheme, which was near the Plaintiff's property known as Plot No.445 in an earmarked residential area. Further, that any Environmental Impact Assessment issued concerning the subject property was illegal since there was no public participation.

18. The Counsel stated that the Plaintiff alleged not having been consulted by the 2nd , 3rd & 4th Defendants about the subject property, thus violating their right to a healthy environment. Finally, that the Plaintiff also alleged that the 2nd, 3rd and 4th Defendants had failed to undertake their statutory duties and mandates by continuing to allow the construction of the subject property.

19. While opposing the objection, the Learned Counsel submitted on whether the 1st Defendant's preliminary objection should be allowed on the grounds that the Plaintiff's suit is in contravention of the doctrine of exhaustion of statutory remedies. The Counsel provided the definition of a preliminary objection as was well set out in the case of Mukisa Biscuit Manufacturing Co. Limited (Supra) as follows:

> "…. A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"

20. According to the Learned Counsel, the effect of the case law cited above meant for one to succeed in putting up a Preliminary Objection, it must meet the following criteria;

    a. it must be a pure point of law;

    b. it must be pleaded by one party and admitted by the other;

    c. it must be a matter of law which is capable of disposing of the suit;

    d. must not be blurred by factual details calling for evidence; and

    e. finally, must not call upon the Court to exercise discretion.

21. Therefore, this Court was called to determine whether what had been raised in the Plaintiff's suit constituted a preliminary objection capable of initially disposing of this matter without ascertaining facts. The Learned Counsel asserted that the 1st Defendant had alleged that this court lacks jurisdiction to hear and determine this matter since the Plaintiff failed to exhaust the available dispute resolution mechanisms before coming to this court given under the provision of Sections 61, 78 and 80 of PLUPA Act 2019. Taking that the objection was centred on "the Doctrine of exhaustion", the Court should deal with the legal position of the doctrine of exhaustion and its applicability in this matter. Thus, the Learned Counsel took the Honourable Court through this concept by holding that it was defined in

Black's Law Dictionary 10th Edition as follows - "exhaustion of remedies"; if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief was available. She averred that the Doctrine's purpose was to maintain comity between the courts and administrative agencies and to ensure that courts would not be burdened by cases in which juridical relief was unnecessary. The doctrine of exhaustion was comprehensively dealt with by a 5 - Judge Bench in the case of "Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No.201 of 2019 William Odhiambo Ramogi & 3 others – Versus - Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR". The Court stated as follows:

> " 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6others [2017] eKLR, where the Court opined thus:
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> 2. Conversely, the Court has also dealt with the exceptions to the exhaustion doctrine. In R. – Versus - Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), the High Court described the first exception thus:
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> > " What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others – Versus - Aelous (K) Ltd and 9 Others.)"

22. The Learned Counsel opined that as observed above, the first principle is that the Court may, in exceptional circumstances, consider and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it.

23. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. This was extensively elaborated by Mativo J in the case of:- "Night Rose Cosmetics [1972] Limited – Versus - Nairobi County Government & 2 others [2018| eKLR.

24. The Learned Counsel submitted that from the perusal of the Plaintiff's Application and suit and Defendants' responses to the Application and suit, all parties agree that the suit concerned the construction of a school on Plot No.446 Miritini-Miritni Site and Service Scheme, and the main issue was whether construction works had been approved and licensed by the 2nd, 3rd and 4th Defendants. The 1st Defendant was urging this Court to find that under the doctrine of exhaustion, this suit should be entertained by the Mombasa County Physical and Land Use Planning Liaison Committee in accordance with provisions of Sections 61,78 and 80 of the PLUPA, 2019 which the Counsel cited extensively. However, during the Court proceedings on Wednesday, 30th October 2024, it was brought to the attention of the parties that the County Government of Mombasa had not as yet established its Physical and Land Use Planning Liaison Committee and that parties be guided by the provision of Section 93 of the PLUPA ,2019. To buttress her case, the Counsel refereed Court to the case of: "Owango – Versus - Voi Point Limited & 7 others; Taita Taveta County Government &2 others (Interested Parties) (Environment and Planning Petition E002 of 2024)[2024] KEELC 5223 (KLR)", where the Court held that:

> " The County Government of Taita Taveta has not established its Liaison Committee, and as such, the ELC remains the only available forum for the Petitioner to seek redress. In the circumstances, it is the finding of this court that the 1st Respondent's Preliminary Objection is unmeritorious and the same is dismissed"

25. In conclusion, therefore the Learned Counsel held that this Honourable Court was called to determine whether the Plaintiff had failed to exhaust all the available dispute resolution mechanisms. In so doing, the Court to be guided by the Constitutional and law provisions in its endeavour to serve justice to the parties in this suit.

IV. Analysis & Determination.

26. I have carefully read and considered the Preliminary objection dated 7th August, 2024 and written submissions together with the myriad of cases cited herein by parties, the relevant provisions of the *Constitution* of Kenya, 2010 and statures.

27. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

    a. Whether the Preliminary objection dated 7th August, 2024 by the 1st Defendant raises pure points of law based on Law and Precedents?

    b. Whether the Preliminary objection by the 1st Defendant is merited?

    c. Who bears the costs of the Notice of Motion application dated 31st July, 2024 and the Preliminary objection dated 7th August, 2024.

Issue No. a). Whether the Preliminary objection by the 1st Defendant dated 7th August, 2024 raises pure points of law based on Law and Precedents?

28. Under this Sub heading, the main substratum is whether the Preliminary objection raised by the 1st Defendant is merited. In determining this instant Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.

29. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

30. The above legal preposition has been made graphically clear in the now famous case of "Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696", the court observed that: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue."

31. The same position was held in the case of "Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257" where the Court held that;

> " A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion."

32. Similarly, in the case of "United Insurance Company Limited – Versus - Scholastica A. Odera Kisumu HCC Appeal No. 6 of 2005 (2005) LLR 7396", the Court held that;

> " A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed."

33. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of "In the matter of Siaya Resident Magistrate Court Kisumu HCC Misc. App No. 247 of 2003" where the Court held that;

> " A Preliminary Objection cannot be raised if any facts has to be ascertained."

34. I have further relied on the decision of "Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR":- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

    (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

35. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 1st Defendant:-

a. The suit was filed by the Plaintiff is an abuse of the court process, having been filed prematurely, contrary to the provisions of Sections 61,78, and 80 of the *Physical and Land Use Planning Act*, Cap 303, Laws of Kenya.

b. Sections 61, 78, and 80 of the *Physical and Land Use Planning Act* provide clear and mandatory procedures and administrative remedies for addressing complaints regarding approvals by physical planning departments, which the Plaintiff has not exhausted.

c. The Plaintiff was required by law to exhaust all available administrative remedies, including but not limited to seeking redress through the relevant County Government authorities and the County Physical and Land Use Planning Liaison Committee, before invoking the jurisdiction of this Honourable Court.

d. The Plaintiff's failure to exhaust these statutory remedies and procedures renders this suit incompetent and improperly before the Court, warranting its dismissal in limine.

e. In view of the forgoing, the Honourable Court lacked jurisdiction to hear and determine this matter and in the circumstances, urged to down its tools.

f. The Plaintiff's suit dated 10th June, 2024 and the attendant application were, therefore, an abuse of the court process and should be struck out and/or dismissed with costs to the 1st Defendant

36. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection is on the doctrine of constitutional avoidance.

Issue No. b). Whether the Preliminary objection by the 1st Defendant dated 7th August, 2024 is merited.

37. Under this sub – title the Court shall discuss the merits of the Preliminary Objection by the Interested Parties on the following issues:-

a. Whether the suit was filed by the Plaintiff dated 10th June, 2024 is an abuse of the court process, having been filed prematurely, contrary to the provisions of Sections 61, 78, and 80 of the *Physical and Land Use Planning Act*, Cap 303, Laws of Kenya.

b. Whether the Plaintiff has exhausted the mandatory procedures and administrative remedies for addressing complaints regarding approvals by Physical Planning departments.

c. Whether the Court has the jurisdiction to hear and determine the matter.

38. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with in limine. In the case of "Owners of the Motor Vessel "Lilian S" – Versus - Caltex Oil (Kenya) Limited [1989] KLR 1" Nyarangi, JA expressed himself as follows:-

> " By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".
>
> "'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

39. Further, the Supreme Court in the case of "Samuel Kamau Macharia – Versus - Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011", observed that: -

> " A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

40. Therefore, based on the above legal ratio it behooves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings. Let's begin with analysing whether or not the Plaintiff were required to exhaust the dispute resolution mechanism under the Physical planning statures. It is imperative to note that Parliament enacted the stature known as "The *Physical and Land Use Planning Act*, No. 13 of 2019 (Hereinafter referred to as "The PLUPA") by repealing the Physical Planning *Act No. 6 of 1996*. The new Act has a commencement date of 5th August, 2019.

41. The Jurisdiction of the County Physical and Land use Planning Liaison Committee -

Part VI of the PLUPA and particularly Section 76 establishes a County Physical and Land Use Planning Liaison Committee for each county in all the 47 Counties. The appeal processes at Part VI, Sections 73 to 89 and for enforcement notices at Section 72. As pointed out above, the dispute herein relates to discharge of powers conferred to the public authorities established under the PLUPA and whether or not procedure was followed before the 1st Defendant started construction. The Plaintiff has also challenged he Environmental Impact Assessment license and its approval. The questions of exhaustion of all legal avenues cannot be used to challenge this suit because the Mombasa County Physical and Land Use Planning Liaison Committee is non-existent and has never been formed.

20. 61. Decision making and communication

(1) When considering an application for development permission, a county executive committee member—

(a) shall be bound by the relevant approved national, county, local, city, urban, town and special areas plans;

(b) shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought;

(c) shall take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought;

(d) shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and

(e) in the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease.

(2) With regards to an application for development permission that complies with the provisions of this Act and within thirty days of receiving an application for development permission, the county executive committee member may—

(a) grant the applicant the development permission in the prescribed form and may stipulate any conditions it considers necessary when granting the development permission; or

(b) refuse to grant the applicant the development permission in the prescribed form and state the grounds for the refusal in writing.

(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.

(4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.

Section 61 (3) provides that:-

> " An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed".

While the provision of Section 61(4) provides:-

> " An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court".

The provision of Section 78 of the PLUPA further provides that:-

78. Functions of the County Physical and Land Use Planning Liaison Committee

The functions of the County Physical and Land Use Planning Liaison Committee shall be to—

(a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;

(b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;

(c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and

(d) hear appeals with respect to enforcement notices.

42. Additionally, the provision of Section 80 of the PLUPA further provides that:-

80. Appeal to a County Physical and Land Use Planning Liaison Committee

(1) A person who appeals to County Physical and Land Use Planning Liaison Committee shall do so in writing in the prescribed form.

(2) A County Physical and Land Use Planning Liaison Committee shall hear and determine an appeal within thirty days of the appeal being filed and shall inform the appellant of the decision within fourteen days of making the determination.

(3) The Chairperson of a County Physical and Land Use Planning Liaison Committee shall cause the determination of the committee to be filed in the Environment and Land Court and the court shall record the determination of the committee as a judgment of the court and published in the Gazette or in at least one newspaper of national circulation.

43. At this juncture, what is clear from the foregoing is that jurisdiction and in particular the "Doctrine of Exhaustion" is a crucial aspect that when raised must be determined at the onset of the proceedings. It is potentially dispositive because if the Court is to find that it has no jurisdiction, it will have no option but to terminate proceedings. The question as to whether the doctrines of exhaustion and constitutional avoidance have been contravened are pure questions of law as well because one needs to

only look at the pleadings to ascertain the same and there is no need, so to speak, to receive evidence. The Court therefore finds that the question of jurisdiction as brought by the 1st Defendant is a proper preliminary objection. Ideally, this doctrine is meant to avoid being negatively perceived to be making any conflicting decision with what the same court of equal status has decided over almost the same subject matter.

44. The doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the courts. Indeed, it is now generally accepted that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in court as a matter of law. To this end, there are a few decisions made to this effect. In the case of Mombasa Judicial Review No. 14 of 2019, Lashad Mohamed Mubarak - Versus - County Government of Mombasa [2020] eKLR Justice Sila Munyao noted:-

> " 10. It will be seen from the above, that apart from providing the framework for development control, the statute also provides a mechanism for dispute resolution with respect to Physical and Land Use Planning"
>
> 13. It will be seen from the above, that a person who is aggrieved by a decision of the County Executive Member over a planning application, has liberty to appeal to the County Physical and Land Use Planning Liaison Committee. I believe that this right of appeal is not only on the grant or refusal to grant development permission in the first instance, but also a decision to revoke or modify a planning permission. There is therefore a right of appeal that has been granted by statute. This right of appeal would encompass all matters that a person feels aggrieved against, whether it is procedural or on merits. (Emphasis is mine)"

45. Under the same breath, the Court of Appeal in the case of "Geoffrey Muthinja & Another – Versus - Samuel Muguna Henry & 1756 Others[2015]eKLR" observed as follows:

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

Additionally, in the case of the Court of Appeal decision in "Speaker of the National Assembly – Versus - James Njenga Karume [1992] eKLR." , the Court stated:-

> " .....Where there is a clear procedure for the redress of any particular grievances prescribed by the *Constitution* or the Act of Parliament, that procedure should be strictly followed....."

I fully concur with the robust legal reasoning and ratio in the case of "Geoffrey Muthinja Kabiru & 2 Others - Versus - Samuel Munga Henry & 1756 Others where the Court of Appeal (P. N. Waki, R.N

Nambuye & P.O Kiage J JA) explained the constitutional rationale and basis for the doctrine and held as follows:-

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution." Suffice it to say, this Court is bound by the decision of the Court of Appeal in the case of "Kibos Distillers Ltd & 4 others – Versus - Benson Ambuti Adega & 3 others (2020) eKLR" where the Court held:-
>
> > " .....In this matter the key dispute in the petition before the trial Court was whether the three appellants were polluting the environment and whether the three appellants EIA licences were lawfully processed. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal on the NECC."

46. The Court of Appeal in "Kibos Distillers Limited & 4 others - Versus - Benson Ambuti Adega & 3 others [2020]eKLR stated that inter alia:-

> " Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleading to confer or oust the jurisdiction conferred on a Tribunal or another institution by the *Constitution* or statute..."
>
> "Jurisdiction of the court or a tribunal flows from the *Constitution* or statute and it cannot be conferred by the art and craft of counsel or litigant drawing pleading to confer or oust the jurisdiction given to another institution or tribunal by statute."

47. In a nutshell, it is clear that the original jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies lies with the County Physical and Land use Planning Liaison Committee and this Court only has appellate jurisdiction. However, this subject to the exceptional circumstances as will be demonstrated herein below.

Issue No. b). Whether this Court has jurisdiction to hear this case.

48. Under this sub – heading, notwithstanding on the legal position taken above, the Honourable Court will be critically examining whether there are situation that may grant this Court jurisdiction to hear and determine this matters. In the instant case, the Preliminary objection raised by the 1st Defendant seeks the Court to address the necessity by parties to exploit alternative statutory dispute resolution mechanisms prior to approaching the court as provided under the *Physical and Land use Planning Act* No 13 of 2019 which demands any claim in relation to decision making and communication on issuance and/or refusal and/ or revocation of a development permission be lodged with the County Physical and Land Use Planning Liaison Committee.

49. Nonetheless, in a bid to oust the jurisdiction of the Liaison Committee and demonstrate that this Honourable Court has jurisdiction to hear and determine the suit, the Plaintiffs submitted that they say so because to them there is no decision made by the County Executive Member to warrant invoking

the jurisdiction of the County Physical and Land use Planning liaison Committee under Section 61(3) of the Physical and Planning Land Use Act 2019 . The Plaintiff argues that clearly what is appealable to the County and Land Use Planning Liaison Committee is the decision of the County executive committee member and nothing else.

The Plaintiffs submitted that what that means is that the jurisdiction of the County Physical and Land use Planning Liaison committee can only be invoked in instances where there is a decision of the County Executive Committee Member. To the Plaintiff, put differently the County Physical and land use planning liaison Committee can only sit and preside over an appeal against the decision of the county executive committee member and not a decision by any other person or officer within the county.

50. I reiterate that it is well established jurisprudence that jurisdiction is the foundation upon which a court or Tribunal hears and determines a case. It is the heart that gives a Court the lifeline to hear a matter. Before a court makes one more step, it must be fully satisfied that it possesses the requisite jurisdiction. Without jurisdiction any one more step is a nullity and any orders made by a court without jurisdiction is a nullity without any legal force. It is desirable that questions relating to jurisdiction be raised at the earliest opportunity possible before the court makes further step. Where does the jurisdiction of the Environment and Land Court emanate from? It is trite law that the jurisdiction of the court flows from either the *Constitution* or legislation or both. The Supreme Court of Kenya in the case of "Samuel Kamau Macharia – Versus - KCB & 2 Others, Civil Application No. 2 of 2011 noted:-

> " A Court's jurisdiction flows from either the *Constitution* or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law"

51. The jurisdiction of the Environment and land Court in as far as these matters are concern has been created by law. The provision of Section 93 of the Physical Land use Planning Act provides:-

> " All disputes relating to physical and land use planning, before establishment of the National and County Physical and Land Use Planning Liaison Committees shall be heard and determined by the Environment and Land Court".(emphasis mine)

I take cue from the famous decision to invoke the original and inherent jurisdiction of this Court relating to environmental planning and protection by the decision cited by the Learned Counsel for the Plaintiff of in "Karomo & Seinfert & others – Versus - Pamwhite limited (Supra) & Mombasa Judicial Review No. 14 of 2019, Lashad Mohamed Mubarak – Versus - County Government of Mombasa [2020] eKLR (supra) by Judge S. Munyao establishing the circumstances of invoking the inherent jurisdiction of the Environment and Land Court under Section 93 of the Act when he noted:-

> " 14. ..... Where the parent statute has provided a mechanism for resolving disputes, the court ought to be slow to invoke its inherent jurisdiction, and unless there are special circumstances, for example, that the body that is meant to hear the dispute has not been constituted, then the court ought ordinarily to defer jurisdiction to the specific dispute mechanism body that has been provided for in the statute".

52. Applying this legal principles to the instant case, as a matter of facts, it is now a known fact theta the Mombasa County Physical and Land use Planning Liaison Committee does not exists and has never been constituted. I dare say that the Courts of law are a creature of the *Constitution* with a sole

purpose of provision of the rule of law and protection of the fundamental rights among other rights. In the spirit of the access to Justice as enshrined under Article 48 of the *Constitution* of Kenya, it feels extremely awkward whenever litigants lack or fail to avail to this basic right from the established legally established institutions. In the instant case, I perceive that frustrating atmosphere and feeling depicted from the Plaintiffs when they find out for themselves and are actually authoritatively informed by the representatives of the 2nd Defendant that the Physical Plaining Liaison Committee is not only non existent but also not functional.

53. This grim scenario reminds the Honourable Court to the story of a famous and key character known as Okwonkwo the village wrestler in the Masterpiece book by the Nigerian reknown author Chinua Achebe, "Things Fall Apart" . Mr. Okwonkwo, by then a very respectable character within the village of Umwofia Kwenu, got entrusted the parental responsibility of taking care of a young man called Ikemefuna, captured while young from a neighbouring village of arch enemies. He brought him up so well upto his teenage stage to a point of regarding him as his parent. One day, the elders being suspicious that the boy once grown would be a menace decided that he be killed on pretense of being returned to his ancestor village. but when a decision was arrived at by the Umuofia Kwenu that the boy had to be killed they picked on Okwonkwo to do the heinous act. He inevitable and reluctantly found himself doing it as boy run towards him for safety from group of enraged and impatient elders so that Okwonkwo was almost betraying them. The act haunted him for ever. He lived on this curse upto his death.

54. Likewise, this Court, on being faced by such similar circumstances, it quickly seeks a soft landing solace from the Scripture in songs by David in the book of Psalms 121 verses 1 which holds:-

> "I lift my eyes to the mountains. From where does my help come? My help come from the Lord, who made heaven and earth. He will not let your foot be moved, he who keeps you will not slumber. He who keeps Israel will neither slumber nor sleep. The Lord is your Keeper; the Lord is your shade on your right hand. The sun shall not smite you by day nor the moon by night....."

55. Thus, based on this glaring legal lacuna and vacuum, created by the County Government of Mombasa, the only place left for the Plaintiff herein, is to institute this case before this Honorable Court. Until and unless this legal structure is actually created, and it becomes vibrantly operational, the Court of law should never smash them with machete as Okwonkwo in the story from Mr. Chinua Achebe's Master Piece, did by sending them away. Thus, on that front the preliminary objection fails.

56. From the circumstances of this case, it is rather evident and the Court takes judicial notice that the County Physical Land & Use Liaison Committee for Mombasa has never been established nor operational. Based on the doctrine of "the Burden of Proof" under the provision of Section 107 of the *Evidence Act*, Cap. 80, the 2nd Defendant has not produced any empirical documentary evidence to the contrary. For these reasons, I am compelled to find that this Honourable Court has the original Jurisdiction to entertain the present suit and which does not contravenes the doctrine of exhaustion of statutory remedies in any way for the reasons that, the Plaintiff's suit herein primarily raises the question of planning, use and development of Plot Number ....., which matters are regulated under the Physical Planning *Act, 1996 (No. 6 of 1996)* (repealed) and the *Physical and Land Use Planning Act*, 2019.

57. Thus, in conclusion, I discern that the Plaintiff's suit shall be resolved by this Court in accordance with the provisions of the *Physical and Land Use Planning Act* 2019. Therefore, I find that the objection by the 1st Defendant herein has failed and/or neglected to convince this Court that the Plaintiff never

exhausted the alternative means of dispute resolution as provided by the statute. Hence, the objection is null and void and thus is dismissed with costs.

Issue No. c). Who will bear the Costs of the Preliminary objection dated 7th August, 2024.

58. It is now well established that the issue of costs is discretionary of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

59. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

60. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. See the decisions of Supreme Court "Jasbir Rai Singh – Versus - Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

61. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

62. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of "Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR" the court noted that;

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no "one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by

and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

63. In this case, as this Honourable Court has opined above, the court only awards the 1st Defendant with the costs of the Preliminary objection dated 7th August, 2024.

V. Conclusion & Disposition

64. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes below order:-

a. That the Preliminary objection dated 7th August, 2024 be and is hereby found to lack merit and the same is hereby dismissed with costs.

b. That the Notice of Motion application dated 31st July, 2024 shall be disposed off by way of written submissions as follows:-

i. The Plaintiffs/Respondents, 2nd, 3rd & 4th Defendants/ Respondents herein granted 14 days leave to file and serve replies and written submissions upon being served.

ii. Thereafter the 1st Defendant/Applicant granted 14 days leave to file and serve further affidavit responding to any issues of law raised from the replies and written submissions accordingly.

iii. The Honourable Court to deliver its Ruling on 13th February, 2025 and further direction.

c. That in the meantime, interim orders extended to 13th February, 2025.

d. That costs of the Preliminary Objection dated 7th August, 2024 to be awarded to the Plaintiffs accordingly.

It is so ordered accordingly.

RULING DELIEVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF DECEMBER 2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. M/s. C. Mango Advocate for the Plaintiff/Respondent

c. Mr. Obuli Advocate for the 1st Defendant.

d. No appearance for the 3rd Defendant/Respondent.

HON. LL NAIKUINI (ELC JUDGE)